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September 15, 2006

By Facsimile (916) 341-5199
By E-Mail to bjennings@waterboards.ca.gov
By U.S. Mail
Elizabeth Miller Jennings
Staff Counsel IV
State Water Resources Control Board
P. O. Box 100
Sacramento, California 95812

Re: Order No. R9-2006-0043, NPDES No. CA0001350 by the San Diego Regional Water Quality Control Board, a Permit for the Encina Power Station

Dear Ms. Jennings:

On behalf of Surfrider Foundation, we submit the enclosed Petition Requesting Review of the above-referenced Regional Board order.

Yours very truly,

Lynda F. Johnston
Legal Assistant, for

DEBORAH A. SIVAS, Clinic Director

LFJ:fhs
enc.
pc: John Robertus, Executive Officer (w/encs., by U.S. Mail Only)
San Diego Regional Water Quality Control Board

Cabrillo Power 1 LLC (w/encs., by U.S. Mail Only)

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For Petitioner SURFRIDER FOUNDATION

Before the State Water Resources Control Board

In the Matter of Adoption of Order No. R9-2006-0043, NPDES No. CA0001350 by the San Diego Regional Water Quality Control Board, a permit for the Encina Power Station	**PETITION REQUESTING STATE WATER BOARD REVIEW OF REGIONAL WATER BOARD ORDER NO. R9-2006-0043**

Pursuant to Section 13320 of the California Water Code and Section 2050 of Title 23 of the California Code of Regulations ("CCR"), Surfrider Foundation ("Surfrider")[1] hereby petitions the State Water Resources Control Board ("State Board") to review the August 16, 2006 adoption by the California Regional Water Quality Control Board for the San Diego Region ("Regional Board") of Order No. R9-2006-0043, NPDES No. CA0001350, granting a five-year permit renewal for the Encina Power Station ("EPS") in Carlsbad under the federal Clean Water Act, 33 U.S.C. ¤ 1251 *et seq.*, and the Porter-Cologne Water Quality Control Act ("Porter-Cologne"), Cal. Wat. Code, div. 7, ch. 5.5.

This appeal concerns the Regional Board's failure to exercise its "best professional judgment" in determining whether the EPS facility satisfies the "best technology available for minimizing adverse environmental impact," as required by section 316(b) of the Clean Water Act, 33 U.S.C. § 1326(b). For reasons described below, Petitioner Surfrider requests that the

[1] The contact information for Surfrider Foundation regarding this petition is a 8117 West Manchester Ave, No. 297, Playa del Rey, California 90293, (310) 410-2890.

State Board vacate the Regional Board's August 16, 2006 permit decision and remand San Diego Regional Board Order No. R9-2006-0043 for further consideration.

* * *

1. NAME, ADDRESS, TELEPHONE AND E-MAIL ADDRESS OF THE PETITIONER:

Surfrider Foundation
8117 West Mancheser Ave., # 297
Playa del Rey, California 90293
Telephone: (310) 410-2890
E-mail: jgeever@surfrider.org
Attention: Joe Geever

2. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW AND A COPY OF ANY ORDER OR RESOLUTION OF THE REGIONAL BOARD WHICH IS REFERRED TO IN THE PETITION:

Surfrider seeks review, reversal, and remand of San Diego Regional Board Order No. R9-2006-0043, which renewed the NPDES permit for the Encina Power Station in Carlsbad, California, operated by Cabrillo Power I LLC, for a period of five years, effective October 1, 2006. A copy of the Order is attached hereto and is available on the Internet at http://www.swrcb.ca.gov/rwqcb9/orders/order_files/2006%20order%20files/R9-2006-0043.pdf. In particular, Petitioner challenges the Regional Board's failure to comply with 33 U.S.C. § 1326(b) in issuing the permit.

3. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO ACT OR ON WHICH THE REGIONAL BOARD WAS REQUESTED TO ACT:

August 16, 2006.

4. A FULL AND COMPLETE STATEMENT OF REASONS THE ACTION OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER:

Pursuant to the federal Clean Water Act, the Regional Board is required to exercise its best professional judgment to determine whether the cooling water intake system at the EPS facility is utilizing the best technology available for minimizing adverse environmental impacts to coastal and marine resources. In particular, the Regional Board's professional judgment must be informed by recent regulatory changes enacted by the U.S. Environmental Protection Agency ("EPA") on July 23, 2004 and by recent actions or analyses by the State Board, the California Ocean Protection Council, the California State Lands Commission, and the California Energy Commission. Unfortunately, Order R9-2006-0043 entirely ignores these recent developments

and thereby fails to satisfy the Regional Board's legal obligation to consider them in exercising its professional judgment with respect to the facility's cooling water system.

5. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED:

Surfrider Foundation is a grassroots, nonprofit environmental organization dedicated to the protection and enjoyment of the world's and California's oceans, waves and beaches. Headquartered in San Clemente, California, Surfrider and its 50,000 members recognize that the biodiversity and ecological integrity of the planet's coasts are necessary and irreplaceable and, for that reason, are committed to preserving natural living and non-living diversity and ecological integrity of the coastal environment. In particular, Surfrider works to protect the coastal and marine environment for all people through conservation, activism, research, and education.

Surfrider and its members benefit directly from the protection of these natural resources by using them for a diversity of recreational and aesthetic enjoyment purposes. Additionally, the waters in question are an important resource for recreational and commercial fisheries. The waters also provide significant wildlife values important to the mission and purpose of Petitioner. The value of these waters includes, among other things, critical nesting and feeding grounds for resident and migratory water birds, essential habitat for endangered species and other plants and animals, nursery areas for fish and shellfish and their aquatic food organisms, and open space areas.

Order No. R9-2006-0043 authorizes the EPS facility to withdraw over 850 million gallons of seawater per day from the adjacent coastal environment, destroying all marine life entrained in that intake water. EPA and the State of California have recognized the significant adverse impacts to the coastal environmental from such once-through cooling systems. *See, e.g.,* California Energy Commission Staff Report, *Issues and Environmental Impacts Associated with Once-Through Cooling at California's Coastal Power Plants* (June 2005). Accordingly, Surfrider and its members who use and enjoy these waters are directly and adversely aggrieved by the issuance of Regional Board Order No. R9-2006-0043.

6. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH PETITIONER REQUESTS:

For the reasons states in items 4 and 7, Surfrider seeks an order by the State Board vacating the Regional Board's August 16, 2006 action, remanding Order No. R9-2006-0043 to the Regional Board, and directing the Regional Board to exercise to reconsider this matter in light of California's desire to phase-out destructive once-through cooling systems and the State Board's pending proposal to impose more environmentally protective requirements on such systems.

7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION:

Section 316(b) of the Clean Water Act requires that cooling water intake systems reflect the "best technology available" for minimizing impacts to adverse environmental impacts, 33 U.S.C. § 1326(b), and the Porter-Cologne Act requires that the Regional Board protect and restore beneficial uses of the coastal waters. Cal. Water Code § 13142.5. As this Board is aware, EPA recently adopted regulations implementing section 316(b) governing NPDES permit renewals for existing power plants, commonly known as the "Phase II" rules. 69 Fed. Reg. 41,683 (July 9, 2004). Those regulations establish a national performance standard for existing facilities that requires flow reduction "commensurate with a closed-cycle recirculating system" or, in the alternative, achieves a 60 to 95 percent reduction in the facility's entrainment and impingement mortality. 40 C.F.R. § 124.95(a)-(b).

However, California has recognized that EPA's regulations, which are subject to legal challenge in the U.S. Court of Appeals for the Second Circuit, have a number of exceptions that threaten to swallow the rule for California's coastal plants and essentially allow these aging, inefficient and highly environmentally destructive facilities to continue operating with virtually no changes to protect the marine environment. Several state agencies have responded to this concern by endorsing more stringent safeguards on these facilities. Staff of the California Energy Commission has called for more analysis of cooling system impacts and for incentives and new policy that promote alternative cooling systems. California Energy Commission Staff Report, *Issues and Environmental Impacts Associated with Once-Through Cooling at California's Coastal Power Plants* (June 2005). Consistent with these recommendations, on April 17, 2006 the California State Lands Commission, which as continuing jurisdiction over the state's public trust tidelands and resources, adopted a resolution acknowledging the negative environmental impacts of once-through cooling systems and declaring state policy to prohibit future leases for facilities utilizing such systems. Similarly, on April 20, 2006, the California Ocean Protection Council adopted a resolution calling for a study regarding the technical feasibility of converting coastal power plants to alternative cooling technologies and urging the State Water Board to adopt protective controls to reduce marine life mortality at coastal power plants by 90 to 95 percent – essentially endorsing the national performance standard of closed-cycle cooling without the exceptions built into the Phase II regulations.

This Board likewise has embarked on an effort to review and potentially tighten the state's requirements for coastal power plant cooling systems. The proposal on which this Board is presently seeking public comment would effectively close the loophole created by EPA's rule by mandating that all facilities achieve a full 90 percent reduction in marine life mortality from entrainment, based on average flow volumes for the past five years. State Water Resources Control Board, *Scoping Document: Proposed Statewide Policy on Clean Water Act Section 316(b) Regulations* (June 13, 2006). Moreover, the use of restoration in lieu of an alternative technology, which has already been struck down as inconsistent with the Clean Water Act in the Second Circuit challenge to the Phase I regulations for new facilities, could not be used to achieve the 60 percent reduction mandated by federal regulation, but would be limited to covering the differential between the minimum federal standard (60 percent reduction in mortality) and the minimum proposed state standard (90 percent reduction in mortality). Given

the Board's current schedule for considering these important policy changes, it is entirely possible that more protective state standards could be put in place during 2007.

While the federal Phase II rules allow dischargers to seek a phase-in compliance schedule for gathering information at facilities that intend to meet the performance standard through an approach other than application of a closed-cycle systems, EPA was quite clear that, in the interim, permitting agencies must continue to exercise their "best professional judgment" as to what constitutes best technology available for minimizing adverse environmental impacts. 40 C.F.R. § 125.95(a)(2)(ii). Best professional judgment, if it means anything, must include a careful review of facility impacts in light of the regulatory judgments already made by EPA and various California state agencies. Thus, the Regional Board cannot simply ignore the adverse environmental impacts of the EPS once-through cooling system until its Comprehensive Demonstration Study is completed in accordance with the Phase II regulatory schedule.

Unfortunately, that is precisely what the Regional Board did in approving Order No. R9-2006-0043. As the Fact Sheet for the permit explains, "[t]he Regional Board has opted to forego a formal determination of BTA based on the 1997 study submitted by the Discharger in light of the new CWA Section 316(b) regulations for existing facilities adopted by U.S. EPA." Order No. R9-2006-0043 at F-23. There is no analysis or discussion showing that this nearly ten-year-old study complies in any way with EPA's or the State's current regulatory judgment about what constitutes a sufficient evaluation of intake impacts. For instance, under the Phase II regulations – which constitute the minimal "best professional judgment" required at this time – EPA requires that impingement and entrainment studies include a characterization of all life stages of fish, shellfish and protected species in the vicinity of the plant and susceptible to impingement and entrainment, "including a description of the abundance and temporal and spatial characteristics in the vicinity of the cooling water intake structure(s), based on sufficient data to characterize annual, seasonal, and diel variations in impingement mortality and entrainment (e.g., related to climate and weather differences, spawning, feeding and water column migration)." 40 C.F.R. § 125.95(b)(3). There is no evidence in the record that the Regional Board assessed the outdated 1997 study against these current standards. Indeed, the finding in the 1997 study by the facility owner that the plant is not having an adverse impact is contrary to the general findings of EPA and each of the California agencies that have looked at this problem, suggesting that the study is at best incomplete and, more likely, fatally flawed. The Regional Board must look exercise its best professional judgment by evaluating likely current facility impacts against present performance standards and determining whether additional protective measures (e.g., flow restrictions or seasonal limitations) are warranted and necessary today.

Additionally, Order No. R9-2006-0043 does not incorporate any reopener requirement or contingency provisions to address important future events that will occur or likely occur during the five-year life of the permit. First, under the terms of the permit, by January 9, 2008, the Discharger must prepare a Comprehensive Demonstration Study that "will for[m] the basis for the Regional Water Board's determination of specific requirements, for inclusion into the Discharger's NPDES permit, that establish best technology available (BTA) to minimize adverse

environmental impacts associated with the operation of the cooling water intake structure." Order No. R9-2006-0043 at 18. Yet, there is no provision for automatic permit reopener triggered once the Comprehensive Demonstration Study is complete. While the Regional Board, of course, has the ability to reopen the permit at its discretion, it may choose not to do so, thereby excluding the public from input into the critical BTA determination that will apparently occur in 2008, three years before the permit expires. The exclusion of the public from this critical decision is contrary to the intent of the Clean Water Act and the Porter-Cologne Act.

Second, the State Board is likely to take action on a more stringent statewide once-through cooling policy years before the new EPS permit expires in October 2011. Order No. R9-2006-0043 neither acknowledges this fact nor provides any contingencies for addressing new statewide guidance during the five-year permit term. For instance, the San Diego Regional Board did not attempt to incorporate provisions from the draft policy into the new permit, as the Santa Ana Regional Board has done for the Huntington Beach Generating Station NPDES permit renewal that also occurred in August. Nor did the San Diego Regional Board provide a contingency provision that would, for example, require the EPS facility to satisfy any new state policy on whatever timetable is set forth in that policy. Again, although the Regional Board has the authority to reopen the permit during the new term, there is no requirement or guarantee that it do so. As a result, any statewide policy adopted by the State Board could be seriously frustrated by Order No. R9-2006-0043.

Third, it is Surfrider's understanding that the State Lands Commission lease for the tidelands affected by the EPS cooling system expired on July 7, 1999 and is currently in holdover. Given the April 17, 2006 State Lands Commission Resolution imposing any more restrictive state requirements and express reopeners on lease renewals for facilities utilizing once-through cooling systems, it is important that the Regional Board NPDES permit recognize and incorporate contingencies for potential changes in the terms of the facility's lease over the next five in connection with cooling system requirements.

The Regional Board failed to exercise its best professional judgment in one additional way. As Surfrider noted in its August 2, 2006 written comments on the permit, Cabrillo Power I LLC announced its intention in July 2006 to dismantle and reconfigure the existing ESP facility within the next few years. *See, e.g.,* Michael Burge, *Upgrade May Produce 340 Megawatts of Irony,* San Diego Union-Tribune, July 26, 2006. Although subsequent statements by the company rendered some uncertainty about the likely shut-down date for the antiquated plant, *see* Michael Burge, *Water board Oks High-salt discharge permit*, San Diego Union-Tribune, Aug. 17, 2006, the Regional Board had an obligation, in exercising its best professional judgment, to investigate this issue further and potentially adjust the terms of the facility permit to accommodate it.

The Regional Board's failure to consider future, likely contingencies in the renewed permit could be addressed in two different ways. One approach would be a shorter-duration permit, perhaps two year, that would expire after the Comprehensive Demonstration Study is

complete, requiring the facility to obtain a new permit once the information is available to the Regional Board for a fully section 316(b) BTA analysis. Alternatively, the permit could impose an automatic permit reopener, triggering full public review and input, once the study is completed. In either case, the existing permit also should include mandatory reopeners to accommodate any other state or federal administrative or regulatory changes that may affect regulation or evaluation of the plant's once-through cooling system, including, but not limited to, the adoption of new guidance or rules affecting once-through cooling systems. Without these safeguards, the public cannot be assured of an opportunity to comment in a timely and meaningful fashion on the Regional Board's section 316(b) determination.

8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE APPROPRIATE REGIONAL BOARD AND TO THE DISCHARGER, IF NOT THE PETITIONER:

A true and correct copy of this petition was mailed on September 15, 2006 to the Regional Board and the Discharger at the following addresses:

John Robertus, Executive Officer
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 300
San Diego, California 92123

Cabrillo Power I LLC
4600 Carlsbad Blvd.
Carlsbad, California 92008-4301

9. A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD:

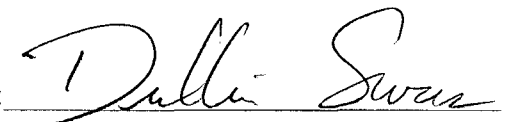
Petitioner Surfrider raised the issues discussed in this petition before the San Diego Regional Board in written comments dated August 2, 2006, a copy of which is attached hereto, and in oral comments during the August 16, 2006 hearing on this matter.

* * *

If you have any questions regarding this petition, please feel free to contact us directly.

Dated: Sept. 15, 2006

Respectfully submitted,

By: 

Deborah Sivas, Clinic Director
Samuel Woodworth, Clinic Student

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August 2, 2006

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Mr. John Robertus
Executive Officer
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, California 92123-4340

Comments on Tentative Orders R9-2006-0043 and R9-2006-0065

Dear Mr. Robertus:

On behalf of Surfrider Foundation ("Surfrider"), we submit these comments on Tentative Orders R9-2006-0043, NPDES Permit No. CA0001350 for the Encima Power Station ("EPS") and R9-2006-0065, NPDES Permit No. CA0109223 for the Carlsbad Desalination ("Desal") Project. Surfrider represents nearly 60,000 members -- all of whom are dedicated to the restoration and protection of our nation's coast and ocean. This letter expands upon the concerns we expressed in our June 5, 2006 letter to the Board regarding Tentative Order R9-2006-0065, which is incorporated herein by reference. For the reasons explained below, Surfrider continues to believe that adoption of these tentative orders and issuance of new five-year NPDES permits for the EPS and Desal Project is premature.

1. Tentative Order R9-2006-0043 (EPS Facility)

As you know, the State Water Board is presently considering the adoption of new state guidance for cooling systems at coastal power plants that would expand upon the "Phase II" regulations recently issued by the U.S. Environmental Protection Agency pursuant to section 316(b) of the Clean Water Act. The proposed policy, which was the subject of a State Board workshop in Sacramento on July 31, 2006, would use the state's residual authority under the Clean Water Act, as well as its own separate authority under the Porter-Cologne Act, to build upon the federal regulations in a way that is more protective of California's marine and coastal resources. It is our understanding that this new state guidance could well be finalized in 2007 and could significantly alter the conditions currently incorporated into proposed NPDES permit CA0001350. In light of these developments, it is premature and inappropriate for the Regional Board to issue a full five-year permit, effective until October 2011, without considering the implications of potentially more stringent state standards to be adopted over the next year.

Equally important, it has recently become public knowledge that NRG Energy, Inc., the parent company of EPS facility owner and operator Cabrillo Power I LLC, intends within three years to dismantle the existing Encina Power Station and replace it with an updated and smaller unit, at a different location on the property, that utilizes an air cooling system, thereby eliminating the use of "once-through cooling" entirely at the site.[1] There thus appears to be no need for the Regional Board to issue a full five-year NPDES permit for the existing EPS plant.

Given the rapidly changing regulatory and business environment for this facility, Surfrider urges the following course of action with respect to the EPS permit:

1. The Regional Board should defer consideration of the EPS permit at the August 16 meeting, continue this agenda item to the next Board meeting, and use the intervening time to work with the facility owner to explore and verify its future plans at the site.

2. If the news reports of NRG's future plans at the site are accurate, the Regional Board should then tailor its renewal of the NPDES permit for the existing facility to the particular circumstances presented here. For instance, the permit could be issued for a more limited period of two or three years, with the express condition that at the end of the permit period, "once through cooling" systems will no longer be allowed for this site, in connection with either the existing plant or a new facility, thereby essentially phasing out this destructive practice. In return, the Regional Board might then consider foregoing the requirements for a Comprehensive Demonstration Study contained in section VII.C.1.b of the draft NPDES permit. If the new plant uses air cooling (or closed cycle cooling towers), it will essentially meet the performance standards set forth in EPA's Phase I and Phase II rules without the need for an impingement and entrainment study, a restoration plan, or any of the other analyses required for facilities that do not use alternative cooling technologies to meet the performance standard. This approach would be cost effective, both conserving staff permitting resources and saving the operator the money it would otherwise have to spend on studies, while also ensuring maximum long-term protection of our coastal resources.

3. If the news reports are inaccurate and NRG intends to continue operating the existing facility for some longer period of time, the Regional Board should then give more serious attention to how it will, within the confines of the proposed permit, both incorporate the requirements of the Phase II rule and build in sufficient flexibility to accommodate likely rule or policy changes at the state level over the next year or two. These objectives could be achieved, first and foremost, by limiting the duration of the renewed permit to two years and including an express requirement that the permit be reopened upon (i) submission of the Comprehensive Demonstration Study or (ii) adoption of a final state policy on once-through cooling. As it presently stands, the draft permit does not contain

[1] See Attachments 1 & 2: "Desalination plant project moving ahead despite agency's withdrawal." North County Times (July 29, 2006); "County Water authority deep-sixes seawater desalination plan" (July 28, 2996).

any requirements or direction to the discharger once the Comprehensive Demonstration Study is submitted on January 9, 2008. Additionally, even as the facility is completing its Comprehensive Demonstration Study, the Regional Board has a duty to apply "best professional judgment" to its evaluation of cooling system impacts. 40 CFR 125.95(a)(2)(ii) ("Between the time your existing permit expires and the time an NPDES permit containing requirements consistent with this subpart is issued to your facility, the best technology available to minimize adverse environmental impact will continue to be determined based on the Director's best professional judgment."). Thus, the Board cannot and should not merely rubber stamp the existing operations, but must give serious consideration to interim protective measures for minimizing adverse environmental impacts, including such things as daily, seasonal or annual flow restrictions, equipment retrofits, etc.

As you may be aware, the Santa Ana Regional Water Board is presently considering a draft permit for the existing Huntington Beach Generating Station that incorporates much of the proposed State Board policy on once-through cooling and includes an express reopener provision to amend the permit in light of the results of the Comprehensive Demonstration Study. The EPS permit, proceeding on a similar timetable, should include no less stringent provisions.

B. Tentative Order R9-2006-0065 (Desal Project)

Surfrider continues to believe that the draft NPDES permit for the Desal Project is premature and should be deferred until issues concerning the future of the EPS facility are resolved. In particular, although the City of Carlsbad has now certified its EIR for the Desal Project, that document is based on the assumption that the Desal Project will essentially "piggy back" on the outfall stream from the EPS once-through cooling system. This foundational assumption appears no longer to be true. In fact, it is more than reasonably foreseeable that the Desal Project will need to operate as a stand-alone facility, unconnected to the power plant, within the next two or three years – probably well before the Desal Project is even constructed and operating. Thus, the EIR is already out-of-date and must be supplemented to evaluate a project that will likely have a different infrastructure configuration, different environmental impacts, different potential siting and design alternative, and different mitigation options.

As we discussed in our June 5, 2006 letter on this proposed permit, as a policy matter the Regional Board can and should defer consideration of proposed NPDES Permit No. CA0109223 until it has full information regarding both the proposed project and its environmental impacts and alternatives. The revisions in the draft permit that require the facility to submit salinity and toxicity studies after adoption of the order do not satisfy our concerns in this regard. The purpose of the environmental analysis is two-fold. First, it is designed to provide decisionmakers and the public with an understanding of the project's impacts before it is approved and thereby gains irreversible momentum. Second and equally important, environmental review under CEQA requires an evaluation of alternatives that may eliminate or mitigate adverse impacts. Here, for instance, the impacts and wisdom of approving the proposed Desal Project may change dramatically with the decommissioning of the EPS facility. Given that cooling water discharge will soon no longer be available for diluting the brine discharge, the environmental review

should look at alternative source streams, such as subsurface intake systems, to minimize intake impacts and alternative discharge regimes, such as mixing the brine stream with sewage treatment discharges, to minimize receiving water impacts. These alternatives have not yet been analyzed. The post-adoption Flow, Impingement and Minimization Plan requirement added to the revised draft permit does not address this deficiency because it is does not inform the decisionmaker before approval of the project. As the state agency responsible for the protection of water quality in the near-shore marine environment, the Regional Board has authority to require additional, supplemental environmental review before making any decision to approve a permit where, as here, the project is substantially changed from the project considered in the original EIR. *See* 14 CCR §§ 15096(e), 15162, 15052.

Moreover, we believe that the Regional Board has independent authority under the Porter-Cologne Act to evaluate intake impacts from a stand-alone Desal Project under section 13142.5(b) of the Water Code, which provides: "For each new or expanded coastal power plant or other industrial installation using seawater for cooling, heating, or industrial processing, the best available site, design, technology, and mitigation measure feasible shall be used to minimize the intake and mortality of all forms of marine life." Because the Desal Project, as proposed, is an "industrial installation using seawater . . . for industrial processing" seawater into potable drinking water, the Regional Board can and should give close scrutiny to all feasible site, design, technology and mitigation measures that will minimize intake and mortality of marine life. That analysis has yet to be completed for the Desal Project.

In sum, Surfrider urges the Board to deny the requested NPDES permit for the Desal Project unless and until a more thorough environmental review of a stand-alone desalination facility is completed. This approach is the only way for the Board to ensure that a potentially inappropriate project does not gain irreversible momentum before its impacts and alternatives are fully understood. If the Board does move forward to issue an NPDES permit for the Desal Project at this time, that permit should be strictly limited to the project actually evaluated in the EIR. This objective could be accomplished, for instance, by (i) providing that the permit automatically terminates if and when an inflow water stream from the EPS plant is no longer available for dilution and (ii) expressly specifying that the permit does not create any rights or expectation for a future permit once the present EPS cooling system ceases operations.

Once again, thank you for your consideration of Surfrider's continuing concerns over these two projects. If you have any questions about these comments, please feel free to contact us at the above-listed telephone number.

Sincerely yours,

Deborah A. Sivas

Tuesday, August 1, 2006
Last modified Thursday, July 27, 2006 11:24 PM PDT

County water authority deep-sixes seawater desalination plan

By: GIG CONAUGHTON - Staff Writer

SAN DIEGO ---- In an abrupt move Thursday, San Diego County's regional water supplier deep-sixed its dreams of turning seawater off Carlsbad's coast into drinking water, refusing to certify its own $1.8 million environmental study, and choosing to end five years of haggling with the private company studying the idea.

San Diego County Water Authority leaders Thursday said they were dropping any further pursuit of building a long-discussed plant at the Encina power station in Carlsbad that would turn 50 million gallons of seawater a day into drinking water for two reasons:

* After five years of often tempestuous talks, they no longer believed they could reach any sort of deal with Poseidon Resources, Inc., the company that has been studying the desalination project since 2000. Ken Weinberg, the Water Authority's water resources manager, said Thursday the agency and Poseidon were still very far apart in their talks about how much money the Water Authority should pay Poseidon for the plant.

* Recent news that parts of the Encina power station could be shut down, demolished and sold off left them unsure if their desalination plant proposal could be realized.

The decision by the Water Authority, however, does not mean that the $270 million plant will not still be built.

Poseidon, in a move to hedge its bets, had already reached a deal with the city of Carlsbad to build the plant in the event it could not reach a contractual agreement with the regional Water Authority.

Water Authority board members Thursday voted to "reconfirm" their commitment to help the city of Carlsbad in its quest to get the Encina plant built.

Board members and staff also said they would continue to investigate the possibilities of building their own seawater desalination plant at in South Bay and at the San Onofre Nuclear Generating Station ---- both of which are only in the earliest study stages.

Poseidon Vice President Peter MacLaggan, meanwhile, said after Thursday's meeting that the company was happy with the Water Authority's vote. He said it removed the confusion about who was involved in the desalination project and exactly what the project would be.

However, even though Poseidon officials disagree, the "local" Poseidon-Carlsbad deal could be more difficult to get off the ground than a deal between Poseidon and the Water Authority. Poseidon's deal with Carlsbad, which includes two other North County water agencies, would only use slightly less than three-quarters of the 50 million gallons a day that the proposed desalination plant would use ---- meaning Poseidon still needs to find other agencies to buy in.

Also, the California Coastal Commission, which must bless the proposed seawater desalination plant, has said it doesn't like the idea of private companies "controlling" public water supplies.

The Water Authority's decision to back away from the project came as something of a shock to observers.

The agency has publicly identified the Encina project as "critical" for the last three years, and spent five years negotiating with Poseidon.

Water officials said finding a way to extract salt from seawater to quench local thirsts had to be done because the region's population is outgrowing water supplies.

With little rainfall and reservoirs to store supplies, San Diego imports nearly all the water county residents use ---- from 70 percent to 95 percent ---- from two sources, the Colorado River and Northern California's State Water Project, which is suspect because of leaky levees.

Water Authority board member Bud Pocklington said during the meeting, "I guess I'm one of the most disappointed people here in this room today, because of all the years we've been working on desal.

"But desal," Pocklington said, raising his voice for emphasis, "has to be part of our (water supply). Take a look at what's happening in the Colorado River Basin. Of the last six years, five have been drought. Look at the north (California). One earthquake could wipe out our whole water supply."

The Water Authority's decision to back away from the Encina project came just days after it was reported that NRG Energy, Inc., the company that owns the Encina site, planned eventually to demolish the existing Encina plant.

NRG Western President Steve Hoffman said the company planned within three years to build a new power plant on the eastern portion of the 95-acre Encina site using "air-cooled" turbines rather than the current system ---- which uses seawater to cool turbines ---- and eventually tear down the plant that's currently being used. NRG also said that it planned to build its new plant exactly where the Water Authority wanted to build its desalination plant. Poseidon plans to build its plant on a different portion of Encina.

The Encina station, meanwhile, was considered perfect for the proposed seawater desalination plant because it already had environmental, regulatory approval to suck in seawater that could be desalted.

MacLaggan and Poseidon said even if Encina's generators eventually use air instead of seawater for cooling, the company would retain contractual control of the existing seawater intake and outflow system.

But Weinberg said the issue raised serious regulatory questions in the Water Authority's mind.

MacLaggan also said that Poseidon ---- unlike the Water Authority ---- was not surprised by NRG's news that it would reconfigure the Encina station, that Poseidon officials "always" assumed the plant could be shut down.

In related news, a coalition of environmental groups that filed a lawsuit a little over a week ago against the environmental study the city of Carlsbad created for its proposed Encina desalination plant ---- dropped the suit Thursday.

Lawyers representing the coalition would give no reason for withdrawing the suit. The lawsuit alleged that Carlsbad's environmental study did not do enough to show the harm the project would cause. The challenge argued that the desalination plant would significantly harm the ocean, marine life and marine ecosystems.

MacLaggan, who rejected the lawsuits' allegations, nevertheless said the company was happy to see it had been dropped.

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Tuesday, August 1, 2006
Last modified Saturday, July 29, 2006 1:26 AM PDT

Desalination plant project moving ahead despite agency's withdrawal

By: PHILIP K. IRELAND - Staff Writer

CARLSBAD ---- The San Diego County Water Authority's decision Thursday to end its participation in a proposed water desalination plant in Carlsbad does not pose problems for this city's agreement with the plant's builder, Carlsbad city officials said Friday.

The Water Authority's pullout could simplify Poseidon Resources Corp.'s plan to build a $270 million plant to turn seawater into drinking water at the Encina Power Plant in Carlsbad, according to Peter MacClaggan, Poseidon's senior vice president.

The company simultaneously sought agreements with the Water Authority, the county's largest water supplier, and with individual water districts within the Water Authority as a way to maximize chances of developing buyers, MacClaggan said.

Carlsbad is one of three water districts to sign individual deals to buy water from Poseidon's Carlsbad Desalination Project.

Carlsbad's agreement with Poseidon stands, said Carlsbad Planning Director Marcela Escobar-Eck.

"We gave all approvals they needed," Escobar-Eck said Friday. "At this point, it's incumbent on Poseidon to get the approvals they need with the Coastal Commission."

With the Water Authority out of the way, MacClaggan said deals with local water districts should come quickly.

Mayor Bud Lewis said Friday that water is a regional issue, and said he hoped that the Water Authority would somehow find a way to rejoin the project in the future.

"When Poseidon first came to Carlsbad, I thought 'OK, fine, we can work it into a regional solution,' " Lewis said Friday. "The thing that's so tragic is, it should be a regional plant."

According MacClaggan, the Water Authority's pullout will help hasten the project's development by putting pressure on other water districts to sign up.

The Water Authority is San Diego County's principal water supplier, finding and selling water to 23 cities ---- including Carlsbad ---- and water agencies in the region. Because of its regional membership, it has the financial power to swing deals for large water supplies. And it owns the pipelines that could be used to move the water around the county, to and from cities and water agencies. Poseidon and the Water Authority have been trying to negotiate agreements for the past five years.

While developing the $270 million plant, Poseidon also has inked agreements with three North County water districts ---- Carlsbad, Valley Center and Rincon-Del Diablo ---- to buy purified drinking water made from seawater pumped in from the Pacific Ocean. The plant is scheduled for completion in 2008.

Those agreements represent 73 percent of the plant's 50 million gallons of water each day.

Several more small water districts in San Diego County, primarily in North County, have been awaiting the Water Authority's decision before deciding where they will get water, MacClaggan said.

"That's part of the good news. We've had conversations with other water districts, but they've been reluctant to sign."

With the Water Authority's pullout, those water districts now know that a regional solution is not in the works, making them more likely to sign a local deal with Poseidon, MacClaggan said. He declined to name them because of ongoing negotiations.

"The Water Authority action gives us much greater certainty as to how we move forward," he said, noting that those smaller water districts, in all likelihood, will consume the remaining 27 percent of the plant's water.

"We expect that the rest of the output will be fully subscribed by end of the year," MacClaggan said.

With little rainfall and few reservoirs to store supplies, San Diego County imports nearly all the water its residents use ---- from 70 percent to 95 percent ---- from two sources: the Colorado River and Northern California's State Water Project, which is suspect because of leaky levees.

Water officials said finding a way to extract salt from seawater had to be done because the region's population is outgrowing water supplies.

The Water Authority's decision to back away from the Encina project came just days after NRG Energy Inc., the company that owns the Encina site, announced its decision to demolish the existing Encina plant.

NRG Western President Steve Hoffman said the company planned to build a new power plant within three years on the eastern portion of the 95-acre Encina site that would use air-cooled turbines, rather than the seawater-cooled turbines now in use. It would eventually tear down the plant that's being used. NRG also said that it planned to build its plant exactly where the Water Authority wanted to build its desalination plant. Poseidon plans to build its plant on a different portion of the Encina site.

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